Sim Choon Koay (as administrator of the estate of Sim Seoh Beng @ Sim Sai Beng, deceased) & Ors v Koperasi Tunas Muda Sungai Ara Bhd

HIGH COURT (PENANG) — CIVIL APPEAL NO 12B–359 OF 2009
CHEW SOO HO JC
6 JULY 2010

Contract — Settlement — Settlement agreement — Breach of — Vacant possession of land — Delivery of — Reciprocal promises — Failure of appellants to deliver within three months of settlement agreement — Respondent failed to provide temporary site — Respondent breached its promise — Sessions court judge held appellant must vacate land before respondent obliged to provide temporary site — Appeal — Whether trial judge erred — Whether neglect or refusal of appellant to vacate land justified

Contract — Settlement — Settlement agreement — Breach of — Vacant possession of land — Delivery of — Date for completion stipulated in settlement agreement — Failure to comply — Settlement agreement did not express time of essence — Whether time of essence of contract — Whether non-compliance of time render settlement agreement voidable — Whether respondent entitled to terminate at will

Civil Procedure — Jurisdiction — Sessions court — Settlement agreement — Declaratory order that settlement agreement still valid, effective and enforceable — Whether outside jurisdiction of sessions court — Whether sessions judge can displace pleadings of party and give effect to unpleaded remedy — Subordinate Courts Act 1948 s 69

The respondent herein is the registered proprietor of certain lands in Mukim 12, North East District, Penang ('the said land'), together with the premises and a store erected thereon ('the said premises'). Meanwhile, the first appellant, since deceased (represented by administrator of his estate) and the second appellant were husband and wife. They were occupying the said premises as ground tenants to the owner of the said land prior to the respondent. When the respondent became the registered proprietor in 1966, the appellants became cooperative members of the respondent and being members, they were not required to pay any rental as a practice of the respondent. As the respondent required the said land for development of its housing project, notices were given to the first and second appellants to terminate their licence and to vacate the said land. Since the first and second appellants did not heed the notices,

their memberships in the respondent were suspended in 1993 and a legal proceedings was commenced against the appellants for vacant possession. The suit was subsequently withdrawn pursuant to a settlement agreement dated 6 November 2003 ('P12') entered between the respondent and the appellants wherein, inter alia, the second appellant agreed to vacate the said land within three months from the date of execution of the settlement agreement and subject to that, the respondent agreed to withdraw the suspension of the second appellant's cooperative membership, to allow the first and second appellants' membership to be replaced by two of their children, to sell four units of double-storey shophouses under construction at Taman Tunas Muda with two units at discounted member's price to the third appellant, to offer free 3,500 square feet of land to the second appellant and to make available a temporary site for the second appellant's furniture business free of rent for a period until delivery of the possession of the 3,500 square feet of free land. However, the appellants did not deliver the vacant possession within the stipulated three months. Accordingly, the respondent terminated the settlement agreement and subsequently claimed, inter alia, the vacant possession vide the present case. The appellants' defence was that they were at all material time ready and willing to surrender and deliver vacant possession of the said land to the respondent before the deadline of 5 February 2004. The appellants had also earlier written three letters to the respondent in 2003 requesting for the temporary site to enable them to move but the respondent gave no response. Hence, the appellants contended that the respondent was not willing to provide the temporary site for the appellants' furniture business pursuant to the settlement agreement. Further, the appellants contended that the respondent's notice of termination of the settlement agreement was wrongful and in breach of respondent's obligation under the settlement agreement and therefore counterclaimed for a declaratory order that the settlement agreement was still valid, effective and enforceable. The learned sessions court judge ('SCJ') gave judgment in favour of the respondent and dismissed the appellants' counterclaim. Hence this appeal.

Held, allowing the appellants' appeal and affirming dismissal of counterclaim:

(1) The learned SCJ had erred in accepting the respondent's contention that the second appellant must have vacated the said land before the respondent was obliged to provide the temporary site for the second appellant's furniture business under cl 3(iv) of the settlement agreement. To accede to such contention would mean that the second appellant would have to find an alternative site to move their furniture business; thereafter, the respondent would provide the temporary site and the second appellant would only then move to the temporary site. This manner, to this court, is improbable and unreasonable as the intent to provide temporary site would have no meaning in the circumstances. The intent and purpose of providing the temporary site to the appellant was

expressed to be for the second and/or third appellants' furniture business. Without the respondent handing over possession of the temporary site to the appellants, the intent and purpose of cl 3(iv) would have been defeated or that it would be rendered meaningless (see para 9).

(2) The failure of the second appellant to vacate the said land was not in breach of cl 2 of the settlement agreement when the respondent had failed to perform its promise reciprocally. The respondent's conduct had shown that it had waived the notice period when the respondent only replied to the appellants' offer to vacate the said land and move to the temporary site after the three months timeline (see para 10).

(3) Time was not the essence of the settlement agreement when it was not so expressed therein and the mere stipulation of a date fixed for completion in a contract, does not by itself make time to be of the essence of the contract. Further, the conduct of the respondent in allowing the stipulated time to pass before replying the letter of the appellants who were willing to vacate the said land to the temporary site earlier before the three months period as provided in cl 2 of the settlement agreement, clearly indicated that the respondent did not endorse the time to be of the essence of the contract. The settlement agreement was therefore not voidable at the instance of the respondent when the appellants did not comply with the time which was not to be of the essence of the contract (see paras 13 & 15).

(4) The learned SCJ had erred when he held that the appellants had failed to comply with cl 2 of P12 when they did not vacate within the three months notice vide P22. On 4 July 2005 which was about six days after the expiry of three months notice from the date of receipt of the notice P22 which was on 28 March 2005, the appellants' counsel wrote the reply wishing to inspect the said temporary site, expressing that a written tenancy agreement was still desirable. This letter was admitted by the respondent's witness, SP1, as not a rejection of the terms by the respondent vide P22. Hence, the appellants' letter dated 4 July 2005 cannot be construed as a repudiation of the P12 to justify the respondent's termination of P12. For the foregoing reasons and the fact that the learned SCJ had failed to consider this aspect of the law and evidence, this court must exercise the appellate jurisdiction to correct the error accordingly and hold in turn that P22 was not a reasonable notice and hence invalid; the failure to comply by the appellants does not render P12 voidable nor does it justify the respondent to terminate it. The respondent's termination of P12 was therefore wrongful and ineffective (see para 15).

(5) Since 'declaration' was outside the jurisdiction of the sessions court, it was not the duty of the learned SCJ to make out a case for the appellant by converting a remedy not prayed for to one for the sake of bringing it

within his jurisdiction. The court cannot displace the pleadings of the party and give effect to the unpleaded remedy or one which the party attempts to change at the end of the trial without even seeking an amendment (see para 16).

[Bahasa Malaysia summary

Responden di dalam kes ini adalah pemilik berdaftar tanah-tanah tertentu di Mukim 12, Daerah Tenggara, Pulau Pinang ('tanah tersebut'), bersama dengan premis dan sebuah kedai yang didirikan di atasnya ('premis tersebut'). Sementara itu, perayu pertama, si mati (diwakili oleh pentadbir hartanya) dan perayu kedua adalah suami isteri. Mereka menduduki premis tersebut sebagai penyewa asas kepada pemilik tanah tersebut sebelum responden. Apabila responden menjadi pemilik berdaftar pada 1966, perayu-perayu menjadi ahli koperasi responden dan sebagai ahli, mereka tidak diperlukan membayar apa-apa sewa sebagai amalan responden. Oleh sebab responden memerlukan tanah tersebut untuk pembangunan projek perumahannya, notis diberikan kepada perayu-perayu pertama dan kedua untuk membatalkan lesen mereka dan untuk mengosongkan tanah tersebut. Oleh kerana perayu-perayu pertama dan kedua tidak mengendahkan notis tersebut, keahlian mereka di dalam responden telah digantung dalam tahun 1993 dan suatu prosiding undang-undang dimulakan terhadap perayu-perayu untuk milikan kosong. Guaman tersebut kemudiannya ditarik balik menurut satu perjanjian penyelesaian bertarikh 6 November 2003 ('P12') yang dimasuki di antara responden dan perayu-perayu di mana, antara lain, perayu kedua bersetuju untuk mengosongkan tanah tersebut dalam tempoh tiga bulan dari tarikh perjanjian penyelesaian ditandatangani dan tertakluk kepada perkara tersebut, responden bersetuju untuk menarik balik penggantungan keahlian koperasi perayu kedua, untuk membenarkan keahlian perayu-perayu pertama dan kedua diganti oleh dua orang anak mereka, untuk menjual empat unit rumah kedai dua tingkat yang dalam pembinaan di Taman Tunas Muda dengan dua unit pada harga diskaun ahli kepada perayu ketiga, untuk menawarkan 3,500 kaki persegi tanah secara percuma kepada perayu kedua dan untuk mengadakan tapak sementara untuk perniagaan perabot perayu kedua tanpa sewa untuk tempoh sehingga pemberian milikan 3,500 kaki persegi tanah percuma. Walau bagaimanapun, perayu-perayu tidak memberikan milikan kosong dalam tempoh tiga bulan yang dinyatakan. Dengan itu, responden membatalkan perjanjian penyelesaian tersebut dan kemudian menuntut, antara lain, milikan kosong melalui kes ini. Pembelaan perayu-perayu adalah bahawa mereka adalah pada setiap masa material bersedia dan sanggup menyerahkan dan memberikan milikan kosong tanah tersebut kepada responden sebelum tarikh tamat 5 Februari 2004. Perayu-perayu juga telah menulis tiga pucuk surat kepada responden pada 2003 memohon tapak sementara untuk membolehkan mereka berpindah tetapi responden tidak memberikan jawapan. Maka, perayu-perayu menghujah bahawa responden tidak mahu memberikan tapak sementara untuk perniagaan perabot

perayu-perayu berikutan perjanjian penyelesaian. Selanjutnya, perayu-perayu menghujah bahawa notis pembatalan perjanjian penyelesaian tersebut oleh responden adalah salah dan melanggar kewajipan responden di bawah perjanjian penyelesaian tersebut dan oleh itu menuntut balas untuk perintah deklarasi bahawa perjanjian penyelesaian tersebut masih sah, berkesan dan boleh dilaksanakan. Hakim mahkamah sesyen yang bijaksana ('HMS') memberikan penghakiman yang memihak kepada responden dan menolak tuntutan balas perayu-perayu. Maka rayuan ini.

Diputuskan, membenarkan rayuan perayu-perayu dan mengesahkan penolakan tuntutan balas:

(1) HMS yang bijaksana telah terkhilaf dalam menerima hujahan responden bahawa perayu kedua sepatutnya mengosongkan tanah tersebut sebelum responden bertanggungjawab memberikan tapak sementara untuk perniagaan perabot perayu kedua di bawah klausa 3(iv) perjanjian penyelesaian tersebut. Untuk menyetujui hujahan sedemikian akan membawa maksud bahawa perayu kedua akan perlu mencari tapak alternatif untuk memindahkan perniagaan perabot mereka; kemudian responden akan memperuntukkan tapak sementara dan selepas itu barulah perayu kedua akan berpindah ke tapak sementara tersebut. Cara ini, pada mahkamah ini, adalah tidak berkemungkinan dan tidak munasabah kerana tujuan untuk memperuntukkan tapak sementara tidak akan bermakna dalam keadaan tersebut. Niat dan tujuan memperuntukkan tapak sementara kepada perayu telah dijelaskan untuk perniagaan perabot perayu-perayu kedua dan/atau ketiga. Tanpa responden memberikan milikan tapak sementara kepada perayu-perayu, niat dan tujuan klausa 3(iv) akan gagal atau ia akan menjadi tidak bermakna (lihat perenggan 9).

(2) Kegagalan perayu kedua mengosongkan tanah tersebut bukan dalam kemungkiran klausa 2 perjanjian penyelesaian apabila responden telah gagal melaksanakan janjinya pada masa yang sama. Tindakan responden menunjukkan bahawa ia telah mengetepikan tempoh notis apabila responden hanya menjawab kepada tawaran perayu-perayu untuk mengosongkan tanah tersebut dan berpindah ke tapak sementara selepas tempoh tiga bulan (lihat perenggan 10).

(3) Masa bukan intipati perjanjian penyelesaian tersebut apabila ia tidak dinyatakan sedemikian di dalamnya dan pernyataan semata-mata tentang tarikh yang ditetapkan untuk penyelesaian kontrak, tidak dengan sendirinya menjadikan masa intipati kontrak. Selanjutnya, tindakan responden membenarkan masa yang dinyatakan berlalu sebelum menjawab surat perayu-perayu yang bersedia untuk mengosongkan tanah tersebut ke tapak sementara sebelum ini sebelum tempoh tiga bulan seperti yang diperuntukkan di dalam klausa 2

perjanjian penyelesaian tersebut, dengan jelas menunjukkan bahawa responden tidak mengendors masa sebagai intipati kontrak. Perjanjian penyelesaian tersebut oleh itu tidak boleh dibatalkan oleh responden apabila perayu-perayu tidak mematuhi masa yang bukan menjadi intipati kontrak tersebut (lihat perenggan 13 & 15).

(4) HMS yang bijaksana terkhilaf apabila dia memutuskan bahawa perayu-perayu telah gagal mematuhi klausa 2 perjanjian penyelesaian tersebut apabila mereka tidak keluar dalam tempoh notis tiga bulan melalui P22. Pada 4 Julai 2005 yang adalah lebih kurang enam hari selepas tamat notis tiga bulan dari tarikh penerimaan notis P22 yang adalah pada 28 Mac 2005, peguam perayu-perayu menulis jawapan mengenai keinginan untuk memeriksa tapak sementara tersebut, menyatakan bahawa perjanjian penyewaan bertulis adalah masih diingini. Surat ini diterima oleh saksi responden, SP1, sebagai bukan penolakan terma oleh responden melalui P22. Maka, surat perayu-perayu yang bertarikh 4 Julai 2005 tidak boleh ditafsirkan sebagai penolakan perjanjian penyelesaian untuk menjustifikasi pembatalan P12 oleh responden. Atas alasan-alasan tersebut dan fakta bahawa HMS yang bijaksana telah gagal mempertimbangkan aspek undang-undang dan fakta ini, mahkamah ini sepatutnya melaksanakan bidang kuasa rayuannya untuk membetulkan kesilapan tersebut dengan sewajarnya dan memutuskan sebaliknya bahawa P22 bukanlah notis yang munasabah dan oleh itu tidak sah; kegagalan untuk mematuhi oleh perayu-perayu tidak menjadikan P12 boleh batal dan tidak menjustifikasi pembatalan oleh responden. Pembatalan perjanjian penyelesaian oleh responden oleh itu adalah salah dan tidak mempunyai kesan (lihat perenggan 15).

(5) Oleh sebab 'deklarasi' adalah di luar bidang-kuasa mahkamah sesyen, ia bukan tugas HMS yang bijak sana untuk membuktikan kes untuk perayu dengan menukar remedi yang tidak dipohon kepada sesuatu yang dipohon semata-mata untuk menjadikannya di dalam rangkuman bidang kuasa. Mahkamah tidak boleh menggantikan pliding pihak-pihak dan memberikan kesan kepada remedi yang tidak dipohon atau sesuatu yang pihak-pihak cuba tukar di akhir perbicaraan tanpa memohon pindaan (lihat perenggan 16).]

Notes

For cases on sessions court's jurisdiction, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5100-5107.

For cases on settlement agreement, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5140-5144.

Cases referred to

Abdul Rahim bin Syed Mohd v Ramakrishnan Kandasamy (Wan Ahmad Azlan bin Wan Majid & Anor, interveners) and another action [1996] 3 MLJ 385; [1996] 3 CLJ 393, HC (refd)

Araprop Development Sdn Bhd v Leong Chee Kong & Anor [2008] 1 MLJ 783; [2008] 1 CLJ 135, CA (refd)
Ganam d/o Rajamany v Somoo s/o Sinnah [1984] 2 MLJ 290, FC (refd)
Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)
Lim Yoh v Astana Strategi (M) Sdn Bhd & Anor [1998] 3 MLJ 117; [1998] 2 CLJ Supp 275, HC (refd)
Wong Kup Sing v Jeram Rubber Estate Ltd [1969] 1 MLJ 245 (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

Legislation referred to

Contracts Act 1950 ss 38, 38(1), 39(1), 40, 52, 53, 56(2), 68
Subordinate Courts Act 1948 s 69

Gooi Hock Seng (Shan & Gooi) for the appellants.
Arumugam Ganapathy (Ghazi & Lim) for the respondent.

Chew Soo Ho JC:

[1] The respondent is the registered proprietor of lands known as Lots 8671, 8672, 8673, 8674 and 8650, Mukim 12, North East District, Penang held under Title Nos HS(D) 7689, 7690, 7691, 7292 and 7668 ('the said land'), together with premises No 238, Blok B, Mukim 12, Sungai Kluang, 11900 Bayan Lepas, Pulau Pinang and a store erected thereon ('the said premises').

[2] The first appellant, Sim Seoh Beng @ Sim Sai Beng since the deceased (represented by administrator of his estate) and the second appellant were husband and wife and were Occupying the said premises as ground tenant to the owner of the said land prior to the respondent. When the respondent became the registered proprietor in 1966, the appellants became cooperative members of the respondent and being members, they were not required to pay any rental as a practice of the respondent. The respondent contended that if it required the said land for development, the members had to vacate the land. As the respondent required the said land for development of its Taman Sri Tunas housing project, notices were given to the first and second appellants to terminate their license and to vacate the said land. The first and second appellants did not heed the notices. Hence their memberships in the respondent were suspended in 1993 and the respondent commenced legal proceeding against them in the Georgetown Sessions Court vide summons No 52-1836-1997 for vacant possession. The said summons was subsequently withdrawn pursuant to a settlement agreement dated 6 November 2003 ('P12') entered between the respondent and the appellants wherein, inter alia, the second appellant agreed to vacate the said land within three months from the date of execution of the settlement agreement and subject to that, the respondent agreed to withdraw the suspension of the second appellant's

cooperative membership, to allow the first and second appellants' membership to be replaced by two of their children, to sell four units of double-storey shophouse under construction at Jalan Dato' Ismail Hashim, Taman Tunas Muda with two units at discounted member's price to the third appellant, to offer free 3,500 square feet of land to the second appellant and to make available a temporary site for the second appellant's furniture business free of rent for a period until delivery of the possession of the 3,500 square feet of free land. However, the appellants did not deliver vacant possession within the stipulated three months. At the material time, there were series of correspondence between the parties wherein the appellants were willing to deliver vacant possession and that the respondent was to make all necessary arrangements for the appellants to occupy the temporary site; the sizes of the temporary site, the tenancy agreement etc were indirectly discussed. Vide a notice dated 26 March 2005, the respondent demanded the appellants to surrender and deliver vacant possession of the said land within three months from the date of receipt of the notice failing which the appellants would be in breach of the settlement agreement. The appellants vide their letter dated 4 July 2005 requested for a date to inspect the temporary site for which the respondent responded vide its letter dated 5 July 2005 terminating the settlement agreement and subsequently claimed vacant possession, inter alia, vide the present case.

[3] The appellants' defence is that they were at all material time ready and willing to surrender and deliver vacant possession of the said land to the respondent before the deadline of 5 February 2004 as reflected in their letter dated 1 February 2004 to the respondent. They had also earlier written to the respondent three letters in 2003 dated 17 September 2003, 9 October 2003 and 21 November 2003 to request for the temporary site to enable them to move to but the respondent gave no response. It was only on 7 April 2004 ie five months after receipt of the appellants' last letter dated 21 November 2003 and two months after the deadline of 5 February 2004 that respondent forwarded a copy of the tenancy agreement for the temporary site to the appellants for execution. There was no negotiation for the tenancy agreement between 21 November 2003 to 7 April 2004. The disagreement or dispute as to tenancy only arose on 20 August 2004 when the size of the temporary site fixed by the respondent of 1,000 square feet was not acceptable by the appellants who asked for 20,000 square feet. The respondent subsequently increased it to 10,000 square feet but later limited the size to only 7,933 square feet.

[4] The appellants contended that the respondent was not willing to provide the temporary site for the appellants' furniture business pursuant to the settlement agreement. In any event, the appellants contended that they had not rejected the respondent's offer of the 10,000 square feet of the temporary site. The appellants further contended that the respondent's notice of termination

of the settlement agreement dated 5 July 2005 was wrongful and in breach of the respondent's obligation under the settlement agreement. The appellants therefore counterclaimed for a declaratory order that the settlement agreement is still valid, effective and enforceable, general damages and costs.

[5] The learned sessions judge gave judgment in favour of the respondent and dismissed the appellants' counterclaim; hence this appeal.

[6] The two main provisions in the settlement agreement dated 6 November 2003 (P12) (pp 386–390 of the appeal record) which parties centered their arguments are briefly:

(a) Clause 2: The second appellant shall within three months from the date of execution of the settlement agreement, surrender and deliver peaceful vacant possession of No 238, Block B, Mukim 12, Sungai Kluang, 11900 Bayan Lepas, Penang and the store together with other temporary building without any compensation whatsoever from the respondent.

(b) Clause 3: Subject to the fulfillment of cl 2 hereof, the respondent shall:

> (i) & (ii) withdraw the suspension of the deceased's and the second appellant's memberships which shall be replaced in the name of Sim Choon Yee and the third appellant;
>
> (iii) sell to the third appellant four shophouses with two units at discounted member's price and;
>
> (iv) offer to Sim Choon Yee and the third appellant free 3,500 square feet of land being members' entitlement in the respondent's resettlement scheme and will make available a temporary site for the purposes of the second appellant's and/or fourth appellant's furniture business on part of the land held by the respondent in Padang Assam area free of rent until the possession of the free land in the aforesaid scheme is given.

[7] From these two clauses, the respondent contended that the respondent's performance as listed in cl 3 is only subject to the appellants having performed their obligations in cl 2 above. Since the second appellant did not vacate the said land on the due date, the respondent was not obligated to perform its promises under cl 3. The appellants on the other hand contended that the performance by both parties as agreed in cll 2 and 3 above is reciprocal and when the respondent failed to provide the temporary site for the appellants to move their furniture business in accordance with cl 3(iv) in the settlement agreement, the respondent could not contend that the second appellant must vacate the said land first referring to ss 38(1) and 52 of the Contracts Act 1950. The learned sessions judge in this aspect of the evidence, held that the second appellant who had failed to vacate the said land on 5 February 2004 was in

breach of cl 2 above and that the second appellant should vacate the said land before the respondent was obligated to provide the temporary site pursuant to cl 3(iv) under s 53of the Contracts Act 1950 which provides that:

> 53 Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

[8] To appreciate the intent and purpose as well as the interpretation of cll 2 and 3 above, the chronology of events before and after the said settlement agreement are important and relevant to assist this court in arriving at its true position. This chronology of events has been well submitted by the appellants (as amended) as follows:

Chronology of Events

1 September 2001:	Parties started negotiations to settle differences.
2 April 2002:	P (the respondent) through their solicitors, among other terms, offered D (the appellants) exclusive use of their one acre land at Padang Assam, as a temporary site, upon their vacating from P's land (pp 345–347 or 404–405/RA).
8 May 2002:	D through their solicitors accepted the terms contained in the abovementioned written offer (pp 338–339/RA).
19 June 2003:	P's solicitors forwarded a draft settlement agreement for D's approval (p 325/RA).
24 June 2003:	D approved the aforesaid draft agreement and returned the same to P (p 324/RA).
23 July 2003:	D requested P to fix a date to execute the agreed settlement agreement (p 320/RA).
25 July 2003:	P forwarded to D fair copies of the said settlement agreement for D execution.
18 August 2003:	D executed the said settlement agreement ('the agreement') and returned the same to P for their execution (p 310/RA).
17 September 2003:	D wrote to P requesting for the date when D can move to the temporary site at Padang Assam, pursuance to cll 2 and 3(iv) of the agreement (p 309/RA).
29 September 2003:	P wrote unilaterally, without giving any reason or explanation whatsoever, requesting that the whole aforesaid cl 3(iv) to be deleted from the agreement (p 307/RA).
30 September 2003:	D objected to P's aforesaid proposal to delete the whole of cl 3(iv) from the agreement (p 306/RA).
9 October 2003:	D wrote to P for a stamped copy of the agreement and also for a reply concerning D's earlier request, of 17 September 2003, for a date when D can move to the temporary site at Padang Assam (p 305/RA).

7 November 2003:	P returned to D a copy of the agreement executed by P on 6 November 2003 (p 303/RA).
21 November 2003:	D wrote to P to confirm, in pursuance to cl 2 of the agreement, D was ready to deliver vacant possession of P's premises before 1 February 2004 and further requested P to take/make all necessary preparations/arrangements at the Padang Assam site to enable D to occupy the same on 1 February 2004 (p 301/RA).
7 April 2004:	P forwarded a set of tenancy agreement for No 30 Jalan Tengah, Bayan Baru and another set of tenancy agreement for the whole piece of the land held by P at Padang Assam for D's execution (p 300/RA).
9 April 2004:	D informed P that they require only 20,000 square feet of the land at Padang Assam and to specify the same in the tenancy agreement and not the whole piece, (p 299/RA).
29 April 2004:	P's solicitors informed D that P will deal directly with D concerning D's request for 20,000 square feet (p 297/RA).
15 June 2004:	D wrote a complaint to P's chairman of the board of directors over the ten months delay by P in the execution of their obligations under the agreement (p 293/RA).
20 August 2004:	P forwarded copies of the tenancy agreement for Padang Assam offering a 1,000 square feet temporary site, to be executed by D, coupled with a notice to quit (p 282/RA).
24 August 2004:	D replied the proposed 1,000 square feet at the temporary site at Padang Assam was insufficient in that D was already occupying 16,000 square feet (p 281/RA).
15 September 2004:	P informed D that the land under the said 'Sekim Penempatan Semula Jalan Tengah Fasa 5' ('the freeland') was ready to be given possession to D (p 279/RA).
16 September 2004:	D wrote to P clarify on the readiness/conditions of the aforesaid free land (p 278/RA).
14 October 2004:	P replied that the accessibility to the freeland and other infrastructures therein will only be ready within 12 months thereof and possession can only be given within 12 months thereof and coupled with a notice of demand that D surrender and deliver vacant possession of P's premises within three months thereof, 14 October 2004, failing which legal proceedings will be instituted against D (p 210/RA).
2 December 2004:	D wrote to the board of directors of P concerning their 14 December 2004 letter on the freeland, for a meeting to resolve the matter as soon as possible (p 268/RA).
10 January 2005:	P informed D that they are ready to be given possession of the temporary site, measuring 10,000 square feet, at Padang Assam (p 267/RA).
12 January 2005:	D replied that the aforesaid site offered was still insufficient as to what has been requested by D earlier (p 266/RA).

26 March 2005:	P informed D, that they do not intend to enter into a tenancy agreement anymore with D in respect to the temporary site but allow D to temporarily occupy the same, that the temporary site offered measures 10,000 square feet and D is not entitled to ask for a site larger than the free land which is only 7,933 square feet and the temporary site is ready for occupation, coupled with a notice requiring D to surrender and deliver vacant possession of P's premises within three months thereof failing which D will be in breach of the settlement agreement of 6 November 2005 (pp 265/442–443RA).
4 July 2005:	D replied to the aforesaid and requested for a date to inspect the temporary site (pp 264/444 RA).
5 July 2005:	D replied to the aforesaid that the time period to vacate had expired and the question to inspect does not arise and considered that D has repudiated the settlement agreement of 6 November 2005 and P thereof issued a notice to terminate the same (pp 262/445–446 RA).
2 August 2005:	D replied that the P's aforesaid notice of termination is wrongful and in breach of the settlement agreement of 6 November 2003 (pp 261/RA).

[9] From the correspondence dated 2 April 2002 and 8 May 2002 between the solicitors for the respondent and solicitors for the appellants above quoted, it can be seen that there was no mention of the order in which reciprocal promises were to be performed in particular that the second appellant had to vacate the said land and premises first before the respondent would perform its obligations. Secondly, it is a fact that the second appellant had not delivered vacant possession of the said land to the respondent resulting in the claim in this civil suit and it is also a fact that the respondent had sold two units of the double-storey shophouse to the third appellant at a discounted member's price and this discount amounted to RM49,500 which the respondent is also claiming vide para 26(d) in the statement of claim which categorically expressed that the sale was pursuant to the said settlement agreement upon which the respondent had performed its obligation — para 23 of the statement of claim. By electing to perform its obligation under cl 3(iii) without abiding by the order in performing the reciprocal promises which the respondent is contending under s 53 of the Contracts Act 1950, the respondent for whatever reason they might have, is either accepting the fact that there was indeed no such order of performance or that if there was such an order as contended the respondent had waived it by its own conduct. Having performed its obligation under cl 3(iii) disregarding the fact that second appellant had not surrendered and delivered vacant possession of the said land in accordance with cl 2, it is inequitable for the respondent to resile from its election and asserts now that the appellants must perform their obligation under cl 2 first. From the two letters dated 2 April 2002 and 8 May 2002 referred to above and the various

subsequent letters from the appellants expressing the intention to vacate and seeking the respondent to arrange for the temporary site to enable them to move their furniture business to, I am inclined, from the facts of this case, to find that the intent of the parties as initially agreed was to perform respective promises reciprocally with the respondent providing the temporary site and the appellant vacating the said land by moving to the temporary site while waiting for the freeland which the respondent had agreed to offer. Consequently, I agree with the appellant's submission that the learned session judge has erred in accepting the respondent's contention that the second appellant must vacate the said land before the respondent was obliged to provide the temporary site for the second appellant's furniture business under cl 3(iv) above. To accede to such contention as held by the learned sessions judge would mean that the second appellant would have to find an alternative site to move their furniture business; thereafter, the respondent would provide the temporary site and the second appellant would then only move to the temporary site. This manner, to this court, is improbable and unreasonable as the intent to provide temporary site would have no meaning in the circumstances. The intent and purpose of providing the temporary site to the appellant is expressed to be for the second and/or third appellants' furniture business. Without the respondent handing over possession of the temporary site to the appellants, the intent and purpose of cl 3(iv) would have been defeated or that it would be rendered meaningless.

[10] The appellants submit further that after execution of the settlement agreement on 18 August 2003 by the second appellant, the second appellant had written to the respondent on 17 September 2003 requesting for a date for the second appellant to vacate to the temporary site to be made available by the respondent under cl 3(iv) (p 309 of the appeal record) but there was no response from the respondent. A reminder was sent on 9 October 2003 (p 305 of the appeal record) but again there was no response from the respondent. After the settlement agreement had been executed by the respondent and stamped on 6 November 2003, the second appellant vide letter dated 21 November 2003 (p 301 of the appeal record) informed the respondent again that the second appellant was ready to vacate before 1 February 2004 and move to the temporary site on the same date ie four days before 5 February 2004. The respondent did not heed but replied only on 7 April 2004 ie two months after the due date for the second appellant to vacate pursuant to the time frame in cl 2, remitting at the same time a copy of the tenancy agreement of the temporary site for execution by the second appellant (p 300 of the appeal record). From 17 September 2003 to 5 February 2004, the appellants submitted that the respondent had not objected or responded concerning the second appellant's requests for a date to move to the temporary site. The second appellant was at all material time up to 5 February 2004 ready and willing to perform their obligation under cl 2 of the settlement agreement but the respondent had failed/refused to accept the offer to perform by the second appellant. The appellants rely on s 38(1) of the Contracts Act 1950 which

provides that 'The parties to a contract must either perform, or offer to perform their respective promises, unless the performance is dispensed with or excused under this Act, or of any other law' and s 39(1) of the Contracts Act 1950 which states 'Where a promisor has made an offer of performance to the promisee and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract', to submit that the second appellant was not responsible for the non-performance and that she does not lose her right under the settlement agreement. In addition, the appellants submitted that when a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise: s 52 of the Contracts Act 1950. Citing s 68 of the Contracts Act 1950, the appellants asserted that if any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by the neglect or refusal as to any non-performance caused thereby. On the facts and circumstances where the second appellant was willing and ready to vacate the said land pursuant to cl 2, it was submitted by the appellants that the respondent ought to have performed its reciprocal promise to provide the temporary site for the second appellant to move her furniture business to in accordance with cl 3(iv) of the settlement agreement. When the respondent had failed in its obligation to provide the temporary site for the second appellant to move her furniture business, respondent had breached its promise. Hence the second appellant is relieved of her obligation to perform; ss 52 and 68 of the Contracts Act 1950. I agree with the appellants' submission that the neglect or refusal by the second appellant to vacate the said land is excused when the respondent failed to perform its part of the obligation in line with the intent and purpose of providing a temporary site to the second and/or third appellants to move their furniture business to. The failure of the second appellant to vacate the said land up to this point was not in breach of cl 2 of the settlement agreement when the respondent had failed to perform its promise reciprocally and the respondent's conduct had shown that it had waived the notice period when the respondent only replied to the appellants' offer to vacate the said land and move to the temporary site after the three months timeline: see *Lim Yoh v Astana Strategi (M) Sdn Bhd & Anor* [1998] 3 MLJ 117; [1998] 2 CLJ Supp 275 at p 294 cited by the appellants' counsel. There is no repudiation of the settlement agreement up to this point.

[11] However, the respondent's cause of action is based on its notice to the appellants through their solicitors dated 26 March 2005 (P22) (pp 442–443 of the appeal record) giving the appellants three months to vacate upon receipt of this notice and at the same time informing that the temporary site was ready for

occupation. Prior to this notice P22, the respondent had issued an earlier notice to deliver vacant possession to the appellants dated 14 October 2004 (p 433 of the appeal record). But when the appellants replied that they were not obliged to comply with the request vide their solicitors' letter dated 12 January 2005 (p 441 of the appeal record) and requested the respondent to advise on the temporary site at Padang Assam since the earlier notice expressed that the freeland under the respondent's scheme would only be ready for possession to be delivered within 12 months from then which is October 2004, the respondent apparently had abandoned that notice period given to the appellants. Thereafter, the respondent issued its fresh notice P22 dated 26 March 2005 stating that the appellants were not entitled to insist on the land size of the temporary site larger than their free entitlement which is only 7,933 square feet (737 square metres) and the respondent at the same time gave its notice to the appellants to deliver possession within three months from the date of receipt of this notice. The appellants vide their solicitors' letter dated 4 July 2005 (p 444 of the appeal record), replied that they desired a written tenancy agreement and they also requested to inspect the temporary site with the respondent on a date and time fixed by the respondent. Vide its letter/notice dated 5 July 2005 (pp 445–446 of the appeal record), the respondent did not accede to the appellants' request on ground that the appellants had failed to deliver vacant possession of the said land and had breached the settlement agreement thereby repudiating the settlement agreement. The settlement agreement was forthwith terminated by the respondent and the appellants were given seven days notice to deliver vacant possession. Hence, the whole basis of the respondent's claim is based on the notice P22 and the termination of the settlement agreement on ground of repudiation by the appellants vide the respondents' solicitors' letter/notice dated 5 July 2005. The learned sessions judge accepted the notice P22 as validly issued by the respondent which the appellants contended that the learned sessions judge had erred in so finding. They submitted that the respondent had never contended that time is the essence of the settlement agreement nor was there any intention by the parties to make time the essence in P12, the settlement agreement. By the respondent's own conduct which did not comply with the time frame as stipulated in cl 2 when they only replied to the appellants' letter to vacate the said land and move to the temporary site within the three months timeline, after the stipulated timeline. Time was therefore not an essential term or a condition precedent going to the root of the contract. Learned counsel for the appellants cited the case of *Abdul Rahim bin Syed Mohd v Ramakrishnan Kandasamy (Wan Ahmad Azlan bin Wan Majid & Anor, interveners and another action* [1996] 3 MLJ 385; [1996] 3 CLJ 393 where His Lordship Visu Sinnadurai J said at p 405 (MLJ); p 411 (CLJ):

A B C D E F G H I

A It should be emphasised that — as pointed out by the Federal Court in *Ganam d/o Rajamany v Somoo s/o Sinnah* [1984] 2 MLJ 290, the mere stipulation of a date fixed for completion in a contract, does not, by itself make time to be of the essence of the contract. The nature of the property and the surrounding circumstances would still have to be considered in such cases.

B

[12] Learned appellants' counsel went on to argue that even if there was a breach of the time stipulated in the settlement agreement where time is not of the essence, it did not render the settlement agreement voidable for the respondent to terminate at will under s 56(2) of the Contracts Act 1950. He C contended further that under s 40 of the Contracts Act 1950, unless the second appellant refused to perform her promise entirely which is not the case here, the respondent had no right to terminate the settlement agreement referring to *Lim Yoh v Astana Strategi (M) Sdn Bhd & Anor* where His Lordship Augustine Paul JC (as he then was) stated at p 135 (MLJ); p 294 (CLJ):

D

It thus follows that the default in completing the agreement was caused by the plaintiff. The result is that time was no longer of the essence of the agreement and the plaintiff must give reasonable notice in order to make time of the essence (see *Quah Ban Poh v Dragon Garden Re Ltd* [1985] 2 MLJ 159). In such circumstances E the giving of an instant notice of termination will be unreasonable and invalid (see *Goh Hooi Yin v Lim Teong Ghee & Ors* [1990] 3 MLJ 23; *Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat & Anor* [1992] 2 MLJ 68). Thus the notice of termination given by the plaintiff's solicitors pursuant to their letter dated 23 May 1996 is invalid. As the defendants were and still are willing to complete the agreement the plaintiff ought to have allowed them to do so. This is in accordance with s 40 of the F Act which provides that when a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

G Notwithstanding what I have said thus far, even if it can be successfully argued that the defendants did not in fact attempt to complete the agreement on 19 May 1996 that does not advance the plaintiff's case in any way. A party who claims to have rescinded for the other party's failure to meet an essential time bears the onus of proving that he himself was ready, willing and able to meet it (see *Time in the Performance of Contracts* by KE Lindgren, (2nd Ed) at p 143). A party to a contract H can never in law rely on the non-performance of a promise by the other party when he himself had waived performances (see *Strong v Stringer* (1889) 61 LT 470). As the plaintiff was not ready and willing to perform his promise the first defendant need not perform his promise. This accords with s 52 of the Act which reads as follows:

I When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise, unless the promisee is ready and willing to perform his reciprocal promise.

and *Araprop Development Sdn Bhd v Leong Chee Kong & Anor* [2008] 1 MLJ 783; [2008] 1 CLJ 135 citing a short passage from the dissenting judgment at p 167 which I find no necessity to restate as it relates to rescission of contract on a total failure of consideration. On the two terms vide paras (a) and (b) therein (p 442 of the appeal record) stated in the respondent's notice P22, the appellants submitted that the respondent's witness, SP1 had admitted in evidence (pp 64 and 70–71 of the appeal record) that there were no discussions between the parties and further admitted that the terms were unilaterally made by the respondent which was upon the dispute by the appellants over the size of the temporary site that came about after 7 April 2004 (p 300 of the appeal record) and all correspondence thereafter as shown above. Since the terms as contained in the said notice P22 which were admittedly made unilaterally by the respondent without discussion with or agreement by the appellants, it was submitted that such notice was not reasonable. The appellants' contention is that they did not refuse to comply nor reject the size but they wanted to inspect the land as according to SD1, he saw some construction being carried out at the said temporary site (p 142 of the appeal record). The respondent's own witness SP1 when being referred to the appellants' solicitors' letter dated 4 July 2005 (p 444 of the appeal record) said in evidence (pp 71–72 of the appeal record) that he agreed this letter was not a rejection of the terms in P22 by the appellants. It was submitted that based on this admission by the respondent through SP1, the respondent could not claim a repudiation by the appellant. It is thus a serious misdirection by the learned sessions judge that the notice is valid and that the appellant had breached cl 2 of the settlement agreement P12. The respondent, on the other hand, submitted that the notice P22 gave the appellants three months to vacate but the appellants failed to do so and only on 4 July 2005 which was about a week after the expiry of the three months notice that they wrote to request to inspect the temporary site. Since the three months had lapsed, the appellants had breached the settlement agreement which justified its termination by the respondent.

[13] It is a fact that time is not the essence of the settlement agreement (P12) when it was not so expressed therein and the mere stipulation of a date fixed for completion in a contract, does not by itself make time to be of the essence of the contract: see *Ganam d/o Rajamany v Somoo s/o Sinnah* [1984] 2 MLJ 290 (FC) as cited in *Abdul Rahim bin Syed Mohd*'s case. Further the conduct of the respondent in allowing the stipulated time to pass before replying the letter of the appellants who are willing to vacate the said land to the temporary site earlier before the three months period as provided in cl 2 of the settlement

agreement, clearly indicated that the respondent did not endorse the time to be of the essence of the contract. In *Wong Kup Sing v Jeram Rubber Estate Ltd* [1969] 1 MLJ 245, His Lordship Raja Azlan Shah J (as His Royal Highness then was) held that:

> once time for completion was allowed to pass and the parties went on negotiating, time was no longer of the essence of the contract …

[14] Under s 56(2) of the Contracts Act 1950, if time is not essential, the effect of the failure to abide time is provided as follows:

> (2) If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do the thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by the failure.

[15] P12 is therefore not voidable at the instance of the respondent when the appellants did not comply with the time which is not to be of the essence of the contract. From the correspondence between the solicitors of both parties, I find no doubt that the respondent did not make the time to be of the essence of the contract for simple reason that the respondent could not on its part, give possession of the freeland as stipulated in cl 3(iv) nor alternatively provide the temporary site for the appellants' furniture business under the same clause to fulfill its obligations under the settlement agreement (referred pp 426–433 of the appeal record) when the appellants were willing and ready to vacate the said land. From the evidence, I find that the appellants had been ready and willing to vacate and deliver vacant possession of the said land. What they needed was the temporary site for them to move their furniture business which the respondent had agreed to provide when the freeland was not ready to be handed over to them. If only the respondent had provided the temporary site with basic amenities or infrastructure for the appellants to move their furniture business to and yet the appellants failed to do so, one can conclude that the appellants are repudiating the settlement agreement. However, both parties were still indirectly negotiating over whether tenancy agreement should be prepared and the sufficiency of the size of the temporary site for the appellants' furniture business when the respondent decided unilaterally not to have tenancy agreement entered and would provide temporary site free of rent as well as unilaterally decided on the land area to be 10,000 square feet. By giving the notice to quit vide P22 without first giving the appellants the opportunity to consider the two new terms which the respondent unilaterally decided, can the notice P22 be said to be a reasonable notice? This aspect of the evidence was

apparently not considered by the learned sessions judge as can be seen in his judgment particularly at p 33 of the appeal record. This court finds that a non-direction on this material aspect of the evidence which would affect the finding on the validity of the notice P22 amounts to a misdirection by the learned sessions judge. Although P22 stipulated the three months time frame as in the settlement agreement P12 for the appellants to deliver vacant possession it also did not assert that time is to be of the essence of the contract. By merely saying that the respondent shall proceed to enforce their legal rights without further reference to the appellants does not make the time the essence of the contract. A reasonable inference could perhaps be drawn if the appellants have agreed and accepted the two new terms imposed unilaterally on them vide P22 at p 442 of the appeal record by which they have to perform in accordance with what have been promised or agreed upon and when they fail to do so, the respondent may put an end to the contract: see s 40 of the Contracts Act 1950. This is however not the case here. In the absence of the fact that time is made the essence of the contract, under s 56(2) of the Contracts Act 1950, the contract or the settlement agreement P12 does not become voidable by the failure of the appellants to deliver vacant possession at or before the specified time. The respondent therefore could not terminate the settlement agreement (P12) on this ground that the appellants had failed to comply with the three months period given by the respondent. In this sense, I find that the learned sessions judge had erred when he held that the appellants had failed to comply with cl 2 of P12 when they did not vacate within the three months notice vide P22. On 4 July 2005 which was about six days after the expiry of three months notice from the date of receipt of the notice P22 which was on 28 March 2005 vide p 442 of the appeal record, the appellants' counsel wrote the reply wishing to inspect the said temporary site and expressing that a written tenancy agreement was still desirable. This letter at p 444 of the appeal record was admitted by the respondent's witness SP1 as not a rejection of the terms by the respondent vide P22. Hence, the appellants' letter dated 4 July 2005 cannot be construed as a repudiation of the settlement agreement to justify the respondent's termination of the settlement agreement. For the foregoing reasons and the fact that the learned sessions judge has failed to consider this aspect of the law and evidence, I must exercise the appellate jurisdiction to correct the error accordingly and hold in turn that P22 is not a reasonable notice and hence invalid; the failure to comply by the appellants does not render the settlement agreement P12 voidable nor does it justify the respondent to terminate it. The respondent's termination of P12 vide letter dated 5 July 2005 at pp 445–446 of the appeal record is therefore wrongful and ineffective.

[16] On the appellants' counterclaim for a declaration, inter alia, vide para 18 in their statement of defence and counterclaim, I must agree with the

learned sessions judge as well as learned counsel for the respondent that the sessions court has no such jurisdiction to grant a declaration pursuant to s 69 of the Subordinate Courts Act 1948. Learned counsel for the appellant is attempting to draw a distinction in declaratory order with declaratory judgment or declaratory decree saying that the declaratory order sought is an executory order distinct from a decree which is a binding judgment. From *Black's Law Dictionary*, (8th Ed), a 'declaration' is defined as 'A formal statement, proclamation, or announcement, esp. one embodied in an instrument'; 'declaratory judgment' is given the meaning as 'A binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement — Also termed declaratory decree; declaration' while 'executory judgment' is given the meaning as 'A judgment that has not been carried out, such as a yet-to-be fulfilled order for the defendant to pay the plaintiff'. From the meaning ascribed to the words 'declaratory judgment' which is synonymous with 'declaratory decree' or 'declaration' and 'executory judgment', they are clearly distinctive of one another. However, from the prayer in the appellants' counterclaim, the remedy prayed for is 'a declaration that the said settlement agreement dated 6 November 2003 between the plaintiff and the defendants is valid, subsisting and enforceable against the plaintiff'. That is crystal clear with no ambiguity that the appellants are seeking a declaration or a declaratory judgment. Since 'declaration' is outside the jurisdiction of the sessions court, it is not the duty of the learned sessions judge to make out a case for the appellant by converting a remedy not prayed for to one for the sake of bringing it within his jurisdiction. The court cannot displace the pleadings of the party and give effect to the unpleaded remedy or one which the party attempts to change at the end of the trial without even seeking an amendment: see *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 (SC) which adopts *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196. It will also be an utter violation of s 69 of the Subordinate Court Act 1948 for the learned sessions judge to vary the remedy to one within his jurisdiction. Therefore, I do not find that the learned sessions judge has committed any error when he dismissed the appellants' counterclaim for want of jurisdiction.

[17] For the reasons given above, the appeal against the respondent's claim where judgment was entered by the learned sessions judge on 9 October 2009 is allowed. The learned sessions judge's orders made therein are set aside and the respondent's/plaintiff's claim is therefore dismissed. However, the appeal against the order of dismissal of the appellants' counterclaim is dismissed. Order of the learned sessions judge on the counterclaim is affirmed. In the circumstances of this case, I find it inappropriate to order costs and thus make no order as to costs of this appeal.

[18] On the aforesaid decisions, parties will have to comply with the settlement agreement P12 and give effect to the settlement accordingly.

Appellants' appeal allowed and dismissal of counterclaim affirmed.

Reported by Ashgar Ali Ali Mohamed